(5)

No. 89-1598

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

EASTERN AIRLINES, INC.,
Petitioner,

v.

ROSE MARIE FLOYD and TERRY FLOYD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, in view of the presumed liability under the Warsaw Convention for death, wounding or any other bodily injury, an air carrier is liable for fright, psychic injury or emotional distress absent objective bodily injury or absent any physical manifestation of injury?

LIST OF ALL PARTIES AND RULE 29.1 STATEMENT

The parties to the proceedings below were the petitioner Eastern Airlines, Inc. and the following plaintiffs below and respondents to this petition (listed as they appeared in the style of the case):

ROSE MARIE FLOYD and TERRY FLOYD, her husband, CONNIE GALE and MICHAEL GALE, her husband, MICHAEL GALE and CONNIE GALE, his wife, GLORIA PATTERSON, EDMOND PATTERSON, THOMAS J. NOLAN, ROBERT SCHARHAG, EUGENE H. CHAMP, FREDERICK W. HOEHLER IV, SALLY ANN COLLINS, MICHAEL R. DRAMIS, SANDY DIX and GARY DIX, her husband, DANA DIX, by and through her parents GARY DIX and SANDY DIX, as guardians and next friends, ALEXANDER DIX, by and through his parents GARY DIX and SANDY DIX, as guardians and next friends, GERRI ASH SEIF, SUSAN ROONEY and WILLIAM ROONEY, her husband, JANET JACOBS and BRUCE JACOBS, her husband, ALEXANDER EMBRY, SALIM KHOURY and DEBORAH KHOURY, his wife, BRUCE JACOBS and JANET JACOBS, his wife, MYRIAM CARRASCO (f/k/a MYRIAM RILEY), TERRY FLOYD and ROSE MARIE FLOYD, GARY DIX and SANDY DIX, his wife, SALIM KHOURY and DEBORAH KHOURY, his wife, GREGORY MANTZ, by and through his parents, NETTA MANTZ and Harold D. MANTZ, as guardians and next friends, NETTA MANTZ, HAROLD MANTZ, GREGORY D. MANTZ, by and through his father HAROLD D. MANTZ.

In response to Rule 29.1, Petitioner Eastern states that it is a subsidiary of Texas Air Corporation and that the following is a list of Eastern's subsidiaries: Airport Ground Services Corporation, Dorado Beach Development, Inc., Dorado Beach Estates, Inc., EAL, Inc., EAL Properties, Inc., Eastern Airlines Leasing, Inc., Eastern Airlines of Puerto Rico, Inc., Ionosphere Clubs, Inc., JCSS Corporation, Protective Services Corporation, Terminal Sales Company.

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BRIEF FOR THE PETITIONER

Petitioner, Eastern Airlines, Inc. ("Eastern"), respectfully submits this brief on the merits.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1-54) is reported at 872 F.2d 1462. The opinion of the district court (Pet. App. B-1-21) is reported at 629 F.Supp. 307.

JURISDICTION

The opinion of the court of appeals (Pet. App. A-1-2) was entered on May 5, 1989. A petition for rehearing with a petition for rehearing *en banc* was denied on January 11, 1990 (Pet. App. D-1-2). The Petition for Writ of Certiorari was filed on April 10, 1990 and

granted on June 4, 1990. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

The treaty provision involved is Article 17 of the Convention for the Unification of Certain Rules Relating To International Transportation By Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note (1970) ("Warsaw Convention"). Article 17 is set forth below:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, Art. 17.

STATEMENT OF THE CASE

Respondents[1] were passengers on an Eastern flight from Miami, Florida to Nassau, Bahamas. (J.A. 4). Shortly after takeoff, one of the aircraft's three engines failed. The plane was turned around for a landing in Miami, and on the return, the aircraft's other two engines failed. (J.A. 4). As the aircraft lost altitude because of the engine failures, the passengers and crew were prepared for ditching. The cockpit crew subsequently restarted one of the engines, and the aircraft safely landed at Miami International Airport. (J.A. 4-5).

Respondents brought actions pursuant to the Warsaw Convention for damages alleging mental pain and anguish, fright, distress and inability to lead normal lives

[1] There were 25 consolidated cases in this action. Eastern will refer to all of the plaintiffs/respondents collectively as "Respondents."

as a result of the incident. The complaints did not allege that plaintiffs suffered any bodily or physical injury or any physical manifestations of psychic injury. (J.A. 3-9).

The Warsaw Convention. The Convention is a treaty governing international aviation to which more than 120 nations now adhere. The Convention's primary purposes are twofold: to establish a uniform body of rules to govern international aviation and to set limits on carrier liability. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). The Convention applies to "*all* international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, Art. 1 (emphasis added).

The decision below broadly construed the Warsaw Convention to encompass recovery for fright, psychic injury or emotional distress unaccompanied by any "wounding . . . or any other bodily injury," and unaccompanied by physical manifestations of psychic injury. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1475 (11th Cir. 1989), reprinted in Appendix to Petition, A-1 at A-22.

The Montreal Agreement. Due to the dissatisfaction in the United States with the Convention's low limits of liability,[2] the major international air carriers, at the urging of the United States State Department, met in Montreal to increase their liability limits. In the resulting Montreal Agreement,[3] the signatories agreed to include within their conditions of carriage and tariffs a provision raising the liability limit to $75,000 on international flights serving the United States. The parties

[2] The liability limit was fixed at 125,000 poincaré francs by the Convention. Warsaw Convention, Art. 22.

[3] The Montreal Agreement is officially titled: "Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol," Agreement CAB 18900, 31 Fed. Reg. 7302 (1966), note following 49 U.S.C. § 1502. (Pet. Reply App. E).

further agreed to include a provision waiving the right to assert the "due care" defense of Article 20, "with respect to any claims arising out of the death, wounding or other bodily injury to a passenger . . . ." *See Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

The Montreal Agreement is not a treaty. It is a special contract pursuant to Article 22(1) of the Convention between the airline signatories and their passengers which *has the effect* of imposing liability on air carriers *without a showing of fault*. *Air France v. Saks*, 470 U.S. 392, 407 (1985).

The Proceedings Below. The actions commenced in state court and were removed pursuant to the federal court's treaty jurisdiction and consolidated. (Pet. App. B-13). Respondents' complaints contained state law counts for breach of contract, negligence, and entire want of care (or intentional tort). (J.A. 3-9). In the federal count, the complaint sought recovery pursuant to Article 17 of the Warsaw Convention. (J.A. 8). The complaints did not allege that any plaintiff sustained any physical or bodily injury or impact or that any plaintiff experienced any physical manifestation of psychic injury. Under Florida law, recovery for emotional distress caused by simple negligence requires allegations of discernible and demonstrable physical injury. *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903 (Fla. 1985). Recovery for intentional infliction of emotional distress is precluded unless the conduct is found to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. . . ." *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277 (Fla. 1985); *accord*, *Eastern Airlines, Inc. v. King*, 557 So.2d 574, 576 (Fla. 1990), reprinted in Appendix to Petition, C-1-14. Therefore, Eastern moved for judgment on the pleadings based upon Respondents' failure

to state a claim for which relief could be granted under either Florida or federal law.[4] (J.A. 1).

The district court held that the allegations in the complaint failed to establish any intentional or willful misconduct on the part of Eastern in connection with its maintenance of the aircraft. (Pet. App. B-5-8). Therefore, because recovery for mental distress pursuant to the breach of contract count and one of the two tort counts was dependent upon a finding of independent willful misconduct, the district court held that the Respondents failed to state a cause of action under the state law counts. (Pet. App. B-2-8).[5] As to the Warsaw Convention count, the district court, relying on *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D. N.M. 1973), concluded that "mental anguish alone is not compensable under the Warsaw Convention." (Pet. App. B-13).

The Eleventh Circuit Court of Appeals reversed. (Pet. App. A). As to the state law counts, the court held that it was bound by the decision of a Florida appellate court in a related case arising from the same incident holding that the allegations against Eastern stated a cause of action under Florida law for intentional infliction of emotional distress.[6] (Pet. App. A-32). As to the Warsaw Convention count, it expressly rejected the analysis and

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[4] Generally, the cause of action for mental distress requires, *inter alia*, a showing of physical injury, physical manifestation of psychic injury or some intentional misconduct. Prosser and Keeton on *The Law of Torts* 60-65, 359-61 (W. Keeton 5th ed. 1984) (hereinafter *Prosser and Keeton*).

[5] Absent allegations of discernible and demonstrable physical injury, the plaintiffs did not state a cause of action for negligent infliction of emotional distress. (Pet. App. B-4-5).

[6] The decision in *Eastern Airlines, Inc. v. King* was subsequently reversed. (Pet. App. C). The Supreme Court of Florida held that Eastern's conduct herein does not rise to intentional or willful and wanton misconduct. (Pet. App. C-1-14).

conclusions of the New York Court of Appeals in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974) and the United States District Court of New Mexico in *Burnett*. (Pet. App. A-28). The Eleventh Circuit held that the "Convention provides recovery for pure emotional injuries unaccompanied by physical injury." (Pet. App. A-14). The court also held that a passenger could recover damages from an air carrier for pure emotional injury *in excess* of the $75,000 liability limits if the carrier acts with willful misconduct. (Pet. App. A-52).

SUMMARY OF ARGUMENT

1. Article 17 of the Warsaw Convention creates a presumption of air carrier liability but only for damage sustained "in the event" of "death," "wounding" or other "bodily injury." The Eleventh Circuit has construed "bodily injury" to mean mere fright, mental anguish or emotional distress absent bodily injury or absent physical manifestations of injury. At the time the Warsaw Convention was drafted, psychic trauma was not embraced within the term "bodily injury." *Rosman*, 34 N.Y.2d at 403, 358 N.Y.S.2d at 112, 314 N.E.2d at 859 (Stevens, J., dissenting). Nor was the concept of pure mental injury encompassed within the French term "lésion corporelle."

In construing "bodily injury" to mean mere fright, mental anguish or emotional distress, the decision below effectively abandons the ordinary and natural meaning of the treaty's precise and unambiguous terms and impermissibly grafts upon Article 17 a judicially expanded category of compensable injuries not intended by the drafters of the Warsaw Convention.

2. In its attempt to arrive at a meaning of Article 17 which undermines its clear and unambiguous terms, the Eleventh Circuit concluded that the French legal

meaning of "lésion corporelle" was better translated into the English phrase "personal injury" and ascribed to the Convention's drafters the intent to include recovery for pure emotional injury. However, the decision below violates the intent and expectations of the Convention's drafters in disregarding the unequivocal language and drafting history of Article 17. The Convention's framers discussed air carrier liability strictly in terms of physical, bodily injuries. Moreover, the Eleventh Circuit has incorporated principles of French damage law into the Convention in conflict with the framers' express intent to establish international, not parochial, legal standards.

Furthermore, the Eleventh Circuit's conclusion that the requirement of "lésion corporelle" is satisfied by mental injury alone is not supported by the weight of authority. Leading aviation law experts at the time that the Convention was drafted have recognized that "lésion corporelle" is a precondition to an air carrier's liability under Article 17 and that an amendment of Article 17 is necessary before liability can be imposed for pure mental injury. Moreover, the word "lésion" is classically defined in French as an injury or alteration of a bodily organ or tissue. Therefore, the physical connotations of the term effectively restrict the meaning of "lésion corporelle," precluding the inclusion of pure mental injury within its terms.

An analysis of the context in which the treaty's words are used supports the conclusion that "lésion corporelle" is not satisfied by mental injury alone. "Lésion corporelle" occurs in the phrase "de mort, de blessure, ou de toute autre lésion corporelle." "Blessure" indicates a wounding resulting from physical impact. Therefore, the incorporation of the terms "mort" and "blessure" within "lésion corporelle" conclusively demonstrates that the drafters utilized the phrase solely in the physical sense.

The Eleventh Circuit's construction of Article 17 conflicts with the drafters' intent since the drafters declined to adopt a broad liabilty formulation and chose instead to require that damages flow from a "lésion corporelle" (from a "bodily injury"). Courts were wary of allowing such claims because of the ease in which mental disturbance is simulated. When the uncertainty of claims for pure psychic injury is contrasted with the Warsaw Convention's overall principle of allowing only a regulated burden to be borne by the air carriers, it becomes clear that the drafters did not intend to impose upon air carriers liability for fright, shock or other mental disturbances which are purely subjective and not often marked by any definite physical symptoms capable of clear medical proof.

3. Additionally, the Eleventh Circuit's construction of "lésion corporelle" to include mental injury conflicts with the intent of the drafters as evidenced by the subsequent conduct of the contracting parties, since, subsequent to the Convention's entry into force, the drafters have considered and consistently rejected proposals to expand the categories of compensable injuries to include pure mental injury. The decision's reliance upon the use of the words "personal injury" in the Guatemala City Protocol and the Montreal Agreement as indicative of the intent of the treaty's drafters is wholly misplaced. The record of the proceedings at Guatemala City is devoid of any evidence that the signatories intended a substantive change of Article 17 or a clarification of the original treaty framers' intent. Therefore, it is manifestly impossible to conclude that the change in terminology was a clarification of the original language. More importantly, the Guatemala City Protocol has not been ratified by any nation. Therefore, it is the terms of the Warsaw Convention, *as originally drafted*, which control Eastern's liability in the instant case.

Similarly erroneous is the Eleventh Circuit's conclusion that the use of the phrase "personal injury" interchangeably with "bodily injury" in the Montreal Agreement signifies a clarification of Article 17's language. The signatories to the Agreement did not intend to broaden their liability to claims for pure mental injury. The assumption at Montreal was that the air carrier's liability would be governed by the terms of the Convention itself.

4. The decision below expands an air carrier's liability in a United States court beyond that of its liability in the courts of other signatories to the Warsaw Convention. Scholars in both England and France have concluded that the application of Article 17's express terms by English and French courts would preclude claims for mere mental anguish and anxiety unaccompanied by bodily injury. Moreover, extending the reach of that Article to permit mere "fright" or "mental anguish" expands an air carrier's liability in United States courts beyond that of other signatory nations, even if Article 17 is broadly construed since neither French nor English law recognizes a cause of action for mere fright (under "lésion corporelle") or mere mental anguish.

5. If allowed to stand, the decision below will have a substantial impact on all international aviation. Under the Warsaw Convention and the Montreal Agreement an air carrier is presumptively and strictly liable for its passengers' accidental in-flight injuries. The decision below undermines the Convention's purposes of uniformity and predictability by imposing upon international air carriers strict liability for its passengers' subjective and undemonstrable injuries.

The decision below exposes air carriers to a potentially unlimited number of frivolous and unverifiable claims. Conceivably, every hypersensitive individual with a fear of flying could require an airline to pay on a

claim for the discomfort experienced on a flight beset by unavoidable turbulence.

6. Finally, this Court should determine that the Warsaw Convention exclusively governs claims for injuries sustained during international air transportation. A finding that the Warsaw Convention provides an exclusive cause of action would be consistent with the purpose of the Convention and the intent of the drafters to establish a uniform body of rules governing international air travel. Without such a finding, the goals of the Convention will be thwarted and the economic uncertainties of air travel will increase.

The Court should reverse the decision of the Eleventh Circuit pursuant to the unambiguous terms of the treaty and the clear intent of the framers.

ARGUMENT

I. IN PERMITTING RECOVERY FOR PURE MENTAL INJURY, THE DECISION BELOW IGNORES THE WARSAW CONVENTION'S REQUIREMENT THAT COMPENSABLE DAMAGES FLOW FROM A "BODILY INJURY"

The controversy focuses upon the proper construction of Article 17 of the Convention. The starting point in determining what injuries are compensable under the Warsaw system is the language of the Convention itself. *Chan v. Korean Air Lines, Ltd.*, —— *U.S.* ——, 109 S. Ct. 1676, 1683-84 and n.5 (1989). The language employed is the foremost guide to the drafters' intention. *United States v. Rutherford*, 442 U.S. 544, 551 (1979). Courts must be governed by the Warsaw Convention's text, as adopted by the many separate nations, and give effect to the most natural meaning of its clear and unambiguous terms. *Chan*, 109 S. Ct. at 1683-84 and n.5.

Article 17 creates a presumption of air carrier liability but only for damage sustained "in the event" of

"death," "wounding" or other "bodily injury." Article 17 states:

> The carrier shall be liable for damage sustained *in the event of* the *death* or *wounding* of a passenger or *any other bodily injury* suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, Art. 17 (emphasis added).

Since the official text of the Convention is in the French language, the relevant French text is quoted as follows:

> Le transporteur est responsable du dommage survenu *en cas de mort, de blessure ou de toute autre lésion corporelle* subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

49 Stat. 3000, *reprinted in* 49 U.S.C. § 1502 note.

The parties to the Warsaw Convention intended that international air cariers be liable for passenger injuries only if the requirements of Article 17 are met. *Saks*, 470 U.S. at 402 (Article 17 operates to qualify the liability of international air carriers). Unless the prerequisite event of a "death," "wounding" or "bodily injury" occurs, an air carrier is not liable. *See e.g., Saks*, 470 U.S. at 406 (air carrier not liable absent prerequisite event of an "accident"). At the time the Warsaw Convention was drafted, psychic trauma was not embraced within the term "bodily injury." *Rosman*, 34 N.Y.2d at 403, 358 N.Y.S.2d at 112, 314 N.E.2d at 859 (Stevens, J., dissenting). Nor was the concept of pure mental injury encompassed within the French "lésion corporelle." M. de Juglart, *Traité Elémentaire de Droit Aérien* 330 (1952) (hereinafter *de Juglart*).

Therefore, New York's highest court concluded that, under the Warsaw Convention, an air carrier is liable only for "palpable, objective bodily injuries, including those caused by . . . psychic trauma" but not for the trauma itself or for mere behavioral manifestations of psychic trauma. *Rosman*, 34 N.Y.2d at 400, 358 N.Y.S. 2d at 110, 314 N.E.2d at 857. In construing the words "bodily injury," the *Rosman* court stated:

> We deal with the term as used in an international agreement written almost 50 years ago, a term which even today would have little significance in the treaty as an adjective modifying "injury" except to import a distinction from "mental." In our view, therefore, the ordinary, natural meaning of "bodily injury" as used in article 17 connotes palpable, conspicuous physical injury, and excludes mental injury with no observable "bodily," as distinguished from "behavioral," manifestations.

34 N.Y.2d at 397, 358 N.Y.S.2d at 107, 314 N.E.2d at 855 (emphasis in the original).

In the instant case, Respondents do not allege that they suffered any bodily injury or that the emotional trauma which they allegedly suffered during the flight manifested itself in physical symptoms. (J.A. 3-9). In construing "bodily injury" to mean mere fright, mental anguish or emotional distress absent bodily injury or physical manifestations of injury, the decision below effectively abandons the ordinary and natural meaning of the treaty's precise and unambiguous terms and imposes upon the Warsaw Convention a meaning that was neither contemplated nor intended by its drafters.

In *Chan*, this Court declined to impose on the Warsaw Convention a requirement of adequate notice that was not provided for by the Convention's express terms. *Chan*, 109 S. Ct. at 1684. In so holding, this Court quoted Justice Story's admonition against judicial treaty-making:

> [T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

Chan, 109 S. Ct. at 1684, quoting, *The Amiable Isabella*, 6 Wheat. 1, 71 (1821).

The language of Article 17 unambiguously enumerates the types of injuries which are a precondition to an air carrier's liability under the Warsaw system. The decision below has disregarded the unequivocal language of the Warsaw Convention by expanding an air carrier's liability to damages which do not flow from the prerequisite event of a "bodily injury." As such, it has impermissibly grafted upon Article 17's express terms a judicially expanded category of compensable injuries not intended by the drafters of the Warsaw Convention.

II. THE DECISION BELOW VIOLATES THE INTENT AND EXPECTATIONS OF THE CONVENTION'S DRAFTERS IN DISREGARDING THE UNEQUIVOCAL LANGUAGE OF ARTICLE 17

In interpreting an international convention, the drafting history is consulted only to elucidate an ambiguous text and, even if unclear, the most natural meaning of the treaty's terms control unless contradicted by clear drafting history. *Chan*, 109 S. Ct. at 1683-84 and n.5. Neither the Convention's text nor the deliberations of its framers reflect any ambiguity concerning the liability provisions of Article 17. The decision below ignores the Warsaw Convention's terms, and has employed a strained

interpretation of the Convention's drafting history to obscure an unambiguous text.

A. The Eleventh Circuit's Construction Of Article 17 Conflicts With The Intent Of The Framers As Evidenced By The Warsaw Convention's Drafting History

In interpreting a treaty provision, it is proper to refer to the records of its drafting and negotiation. *Saks*, 470 U.S. at 400. The Eleventh Circuit attempts to justify its expansive construction of Article 17 by interpreting the framers' silence on the issue of damages as indicative of their tacit understanding that the Warsaw Convention would incorporate those damages for pure mental injury perceived to be broadly compensable under French law. (Pet. App. A-14, 16-18). Contrary to the Eleventh Circuit's conclusion, the deliberations of the delegates at the conference leading up to the Warsaw Convention evince the intent that only bodily injuries are compensable under the Warsaw system.

1. *The Decision Below Has Erroneously Incorporated French Law Into The Convention In Conflict With The Framers' Intent To Establish International, Not Parochial, Legal Standards*

There is no suggestion in the treaty's drafting history that French law was intended to govern the meaning of the Warsaw Convention's terms. *Rosman*, 34 N.Y.2d at 394, 358 N.Y.S.2d at 104, 314 N.E.2d at 853. The treaty that became the Warsaw Convention was initially drafted at the First International Conference on Private Aeronautical Law which took place in Paris in 1925. *Saks*, 470 U.S. at 401. The draft Convention was revised and adopted at a second conference which took place in Warsaw, Poland in 1929. The Convention's first and most obvious purpose was to establish internationally uniform liability rules and limits. *Franklin Mint*, 466 U.S. at 256-57. The Convention's drafters, therefore, strove for legal standards which could be

translated, harmonized and applied by the various nations represented at the conference. *See e.g., Minutes, Second International Conference on Private Aeronautical Law*, Oct. 4-12, 1929, Warsaw 59 (R. Horner & D. Legrez trans. 1975) (hereinafter *Minutes*) (addressing the need for clarification of phrase "intentional illicit act" for application by English courts). *See also Id.* at 60-62 (clarification of phrase "faute lourde"). The results were international, not parochial, legal standards that would "satisfy both peoples under English or Anglo-Saxon law and peoples under Continental laws." *Id.* at 208 (comments of Mr. Giannini). *See also Id.* at 212 (clarification of willful misconduct standard was a compromise between French and English standards). Article 17 does not, therefore, incorporate into the Warsaw Convention the damages law of any particular locale. Instead, it qualifies the preconditions to air carrier liability by requiring that the damages flow from the prerequisite ent of a "death," "wounding" or other "bodily injury."

2. *The Decision Below Has Erroneously Overlooked That The Convention's Framers Discussed Air Carrier Liability Strictly In Terms Of Physical Injuries*

In debating the various provisions of the Warsaw Convention, the drafters discussed the air carrier's liability strictly in terms of physical, "bodily injury." Henri De Vos of Belgium, the Reporter of the Warsaw Convention, in considering whether a fault theory or a risk-shifting theory of liability would be preferable, explicitly referred to the air carrier's liability in terms of "bodily injury":

> One has wondered if it would not be necessary to allow risk theory in this area as the basis for the system of liability for death and *bodily injury*.

Id. at 21 (emphasis added).

During the seventh session, Mr. Amedeo Giannini of Italy, in discussing the need to have separate articles for

passenger death, injury, loss of goods and delay, discussed the air carrier's liability strictly in terms of a physical injury:

> There were many amendments proposed and under these conditions the drafting committee envisaged the possibility of retaining the system of the CITEJA[7] preliminary draft . . . . But, given that there are entirely different liability cases: death or *wounding*, disappearance of goods, delay, we have deemed that it would be better to begin by setting out the causes of liability for persons, then for goods and baggage, and finally liability in the case of delay.

Id. at 205 (emphasis added).

In discussing the desirability of dividing Article 24 (addressing willful misconduct) into two separate articles, Mr. J. Wolterbeek-Muller of the Netherlands, in terms connoting unmistakable physical injury, stated:

> I propose to divide up this article and to make a special article with paragraphs 2 and 3. In the first paragraph, death and *wounding* are involved, while in the other paragraphs goods are involved. So that there be no confusion, I think it would be better to make two articles.

Id. at 212 (emphasis added).[8]

The Convention's framers discussed the liability provisions of Article 17 in terms of "bodily injury." The Eleventh Circuit's construction is not supported by the Convention's clear drafting history.

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[7] The CITEJA refers to the Comité Internationale Technique d'Experts Juridiques Aériens.

[8] In the French language version of the conference minutes, the delegates employed the words "blessure" (wounding) and "lésion corporelle" (bodily injury). II *Conférence Internationale de Droit Privé Aérien*, 4-12 octobre 1929, Varsovie 16, 52, 135, 139 (ICAO 1933).

3. *The Eleventh Circuit Has Erroneously Concluded That The Requirement Of "Lesion Corporelle" Is Satisfied By Mental Injury Alone*

The Eleventh Circuit's strained construction of "lésion corporelle" is not supported by the weight of authority. The leading French and European aviation law experts at the time that the Warsaw Convention was drafted have noted that the requirement of "lésion corporelle" is not satisfied by mental injury alone. G. Coquoz, *Le Droit Privé International Aérien* 122 (1938) (Convention's "lésion corporelle" should be amended to indicate that pure mental injury is compensable); *de Juglart*, *supra* p. 11, at 330 (recovery for pure mental injury should have been provided for in Article 17); K.M. Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J. Air L. & Com. 395, 401-02 (1949) (drastic revision and amplification of Article 17 is required in order to clarify that pure mental injury is covered); G.R. Sullivan, *The Codification of Air Carrier Liability By International Convention*, 7 J. Air L. & Com. 1, 19 (1936) (doubting that Article 17 covers injury resulting from fright absent physical manifestations of injury). Even into the 1950's, French delegates to a 1951 conference considering revisions to the Warsaw Convention noted that the expression "lésion" presupposes a rupture of body tissue and is too narrow an expression to permit recovery for mental illness. ICAO Legal Committee, *Minutes and Documents of the Eighth Session, Madrid*, 11 *Sept.*—28 *Sept.*, 1951,—ICAO Doc. 7229-LC/133 at 270 (1951) (hereinafter *Madrid Minutes*) (comments of Mr. Garnault). *See* discussion, *infra* pp. 25-27.

In its attempt to arrive at a meaning of Article 17 which undermines its clear and unambiguous terms, the Eleventh Circuit concluded that the French legal meaning of "lésion corporelle" was better translated into the English phrase "personal injury," and ascribed to the Convention's drafters the intent to include recovery

for pure emotional injury.[9] However, nothing in French law compels the conclusion that, in using the phrase "lésion corporelle," the drafters of the Warsaw Convention specifically intended to permit recovery for pure emotional injury.

Initially, it should be noted that "lésion corporelle" does not formally identify a type of damage in French law. *Palagonia v. Trans World Airlines*, 110 Misc.2d 478, 442 N.Y.S.2d 670 (Sup. Ct. 1978). Instead, the basic distinction in French damage law is between "dommage matériel" and "dommage moral." "Dommage matériel" includes any economic loss suffered by the plaintiff, such as loss of wages, medical and funeral expenses or benefits. B. Nicholas, *French Law of Contract* 221-22 (1982) (hereinafter *Nicholas*); *Amos and Walton's Introduction to French Law* 209 (F.H. Lawson, A.E. Anton & L. N. Brown, 3d ed. 1967) (hereinafter *Amos and Walton*). "Dommage moral" includes all other forms of damage which do not cause an economic loss such as the right to privacy, damage to a person's honor (as in the case of defamation), mental suffering occasioned by the death of a loved one or the pain and suffering occasioned by physical injuries to oneself. M. Plainol and G. Ripert, 2 Treatise on the Civil Law, § 868A (Louisiana State Law Institute trans. 11th ed. 1939); *Amos and Walton*, *supra*, at 209; *Nicholas*, *supra*, at 221-22. The composite concept of "dommage corporel" is used to refer to both "matériel" and "moral" damages which may result from personal injury, *e.g.*, medical expenses, loss of wages, or pain and suffering. G. Miller, *Liability*

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[9] Since the Convention was drafted in French by continental jurists, Courts will *consider* the French legal meaning of the Warsaw Convention's terms, not because "we are forever chained to French law by the Convention, but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399 (citations omitted) (emphasis added).

in International Air Transport 113 (1977) (hereinafter *Miller*).

The Eleventh Circuit erred in concluding that the phrase "lésion corporelle," by analogy to the French concept of "dommage corporelle," would extend to purely mental or emotional injury. (Pet. App. A-16, n.16).[10] This reasoning is fundamentally flawed because the incorporation of the French "dommage corporel" into the Convention is contrary to the international, nonparochial standards established by the Convention's framers. (*See* discussion, *supra* pp. 14-15). Moreover, "lésion corporelle" is *not* analogous to "dommage corporel."

The word "lésion" is classically defined in French as an injury or alteration of a bodily organ or tissue. Le Petit Robert, Dictionnaire de La Langue Française (1970) ("changement grave dans les caractères anatomique et histologiques d'un organe sous l'influence d'une maladie, d'un accident"),[11] *quoted in*, *Miller*, *supra*, at 127.[12] While the word "corporel" and the phrase "dommage corporel" may broadly reflect damages flowing from both bodily or psychic injury, "lésion" only connotes bodily injury. Moreover, because all of the pertinent

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[10] *See also Palagonia*, 110 Misc. 2d at 403, 442 N.Y.S.2d at 673-74.

[11] Severe change in the anatomical and histological character of an organ as the result of illness or injury.

[12] "Lésion" is similarly defined by other authorities as follows:

> An injury or wound to a bodily organ . . . . Lésion is the alteration, more or less profound, of an organ or tissue. Dictionnaire Encyclopédique Quillet (1938) ("Atteinte, blessure portée a un organe. . . . La lésion est l'altération plus ou moins profonde d'un organe ou d'un tissu.");
>
> Change in the structure of a tissue or bodily organ as the result of disease. Petit Larousse Illustré (1990) ("Modification de la structure d'un tissu, d'un organe sous l'influence d'une cause morbide . . . .");
>
> Bodily injuries. J. Baleyte, Dictionnaire Juridique (1977) ("Lésion corporelles").

definitions of the word "lésion" emphasize that a bodily organ is affected, the physical connotations of the term effectively restrict the meaning of "lésion corporelle," precluding the inclusion of pure mental injury within its terms. *Miller*, *supra* p. 19, at 126-28. The bodily or physical connotations of the word "lésion" are so acute that one cannot, for example, translate "lésion mentale" into "mental injury." At best, "lésion mentale" could be interpreted as a "poorly worded reference to an injury to the brain." *Id.*[13]

The requirement of "lésion corporelle" is, therefore, not satisfied by pure mental anguish or distress. That the drafters declined to use the phrase "dommage corporel," which does not draw a sharp distinction in French law between bodily and mental injury, and chose instead the phrase "lésion corporelle," which clearly contemplates only "bodily injury," conclusively establishes the drafters' intent that only the latter be compensable under the treaty's terms.

An analysis of the context in which the treaty's words are used supports this conclusion. *Saks*, 470 U.S. at 399. "Lèsion corporelle" occurs in the phrase "de mort, de blessure ou de toute autre *lésion corporelle*." The contextual meaning of the critical words of Article 17 indicates that the drafters intended to limit recovery to bodily injury. "Blessure" indicates a wounding resulting from physical impact. Pet. App. A-17 *citing* R. Mankiewicz, *The Liability Regime of the International Air Carrier* 146 (1981) (hereinafter *Mankiewicz*). Therefore, the incorporation of the terms "mort" (death) and "blessure" (wound) within "lésion corporelle" conclusively demonstrates that the drafters utilized the phrase solely in a

[13] Although the word "lésion" has an abstract meaning in French law, none of those applications affect the meaning in which lesion is used in Article 17. *Miller*, *supra* p. 19, at 128. An example of the utilization of "lésion" in an abstract or figurative sense is the "lésion" of a right such as the right to obtain a fair price in some contracts of sale. *Id.*

physical sense. *Rosman*, 34 N.Y.2d at 399, 358 N.Y.S.2d at 109, 314 N.E.2d at 856; *Burnett*, 368 F.Supp. at 1152; *Miller*, *supra* p. 19, at 128.

By redefining "lésion corporelle" to mean mere mental anguish or emotional injury, the decision below ignores a distinction rooted in treaty language which is the "foremost guide to the drafters' intent." *Rutherford*, 442 U.S. at 551.

4. *The Decision Below Conflicts With The Intent To Limit Liability As Evidenced By The Circumstances In Which The Treaty Was Drafted*

International agreements, such as the Warsaw Convention, "are to be read in light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the states thereby contracting." *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912). To the extent that, at the time of the Convention's drafting, French law permitted recovery for 'matériel" and "moral" damages, this was directly attributable to the broad statutory language of Section 1382 of the Napoleonic Code, in effect in 1929, which provided:

> Any action whatsoever by a person causing damage to another obliges that person to repair the damage caused.

Code Civil [C. civ.] § 1382 (Fr.).[14]

Had the drafters of the Warsaw Convention, as the Eleventh Circuit suggests, intended to provide for as broad a variety of compensable damages as existed at the time in France under the Napoleonic Code, they well knew how to express the concept. The fact that they declined this broad formulation and chose instead to re-

[14] Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.

quire that damages flow from a "lésion corporelle" indicates that the drafters intended to limit air carrier liability to "bodily injury." [15]

This conclusion is buttressed by the changes that Article 17 underwent in the Convention's drafting process. The first draft of the treaty that became the Warsaw Convention contained an article specifying: "The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damages. . . ." [16] *Saks*, 470 U.S. at 401, citing *Minutes, Conférence Internationale Du Droit Privé Aérien* 87 (Paris 1925). This wording was found to be too general and far-reaching to satisfy the various nations represented at the conference. *Id.* at 79. The Paris Conference appointed a committee of air law experts who would produce a narrower provision acceptable to nations whose law was not so liberal. *Burnett*, 368 F.Supp. at 1157. The article was revised several times by the committee and then submitted to the second conference that convened in Warsaw in 1929. The draft submitted to the conference required, as a prerequisite to liability, that the damage result from "death," "wounding" or other "bodily injury," as evidenced by the following wording:

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[15] Gérard Legier, a French commentator, agrees with the district court's conclusion, in the instant case, that the restrictive phrase "lésion corporelle" was intended to limit recovery to bodily injury. Legier notes:

> It is true that French law readily permits recovery for mental injury, however, this is so because the French texts do not use restrictive legal standards with the result that there is recovery for all types of injuries.

G. Legier, *L'Application de la Convention de Varsovie par la Juridiction Américaine Présentation de la Jurisprudence Récente*, 161 Revue Francaise de Droit Aérien 274 n.51 (1987).

[16] "Le transporteur est responsable des accidents, pertes, avaries et retards. Il n'est pas responsable s'il prouve avoir pris les mesures raisonnables pour éviter le dommage . . . ." [1925 Paris] *Conférence Internationale de Droit Privé Aérien* 87 (1936).

> The carrier shall be liable for damage sustained during carriage:
>
> (a) *in the case of death, wounding*, or any *other bodily injury* suffered by a traveler;
>
> (b) in the case of destruction, loss, or damage to goods or baggage;
>
> (c) in the case of delay suffered by a traveler, goods, or baggage.

Minutes, supra p. 15, at 264-65 (emphasis added).

The effect of this amendment was to make clear that an air carrier's liability was to be limited to damages flowing from death or bodily injuries. *Saks*, 470 U.S. at 401-03 (finding that change in early drafts of Warsaw Convention suggests an intentional change of meaning by the Convention's drafters). "By thus restricting the recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone." *Burnett*, 368 F.Supp. at 1157.

Moreover, the legal background to the writing of the Convention and the Convention's recognized purpose belie the view that the drafters intended to permit recovery for injuries which cannot be ascertained with some degree of precision. At the time the Convention was drafted, the cause of action for mental distress was not widely recognized. Note, *Recovery For Mental Anguish Under The Warsaw Convention*, 41 J. Air L. & Com. 333, 339 (1975). Even those nations which, to some extent, permitted recovery for mental injury absent physical injury wrestled with the concept. A.F. Lowenfeld, *Hijacking, Warsaw and the Problem of Psychic Trauma*, 1 Syracuse Int'l L. J. 345, 348 (1978) (hereinafter *Lowenfeld*). For example, it was originally doubted whether "moral" damages could be awarded under French law in a breach of contract claim. *Amos and Walton, supra* p. 18, at 185.

Moreover, France's *Conseil d'Etat* formerly refused to award "moral" damages in an administrative action. *Id.* at 209. In England, the cause of action for mere mental anguish or emotional distress or grief, absent bodily injury, is *not* recognized. *McLoughlin v. O'Brien and Others*, [1982] 2 All E.R. 298, 301, 311. Moreover, it was not until the early 1940's that an English court, in dicta, recognized a cause of action for "nervous shock." *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396, [1943] AC 92. Even then a showing of severe, positive psychiatric illness, such as anxiety neurosis or organic depression is required, as contrasted with mere mental anguish. *McLoughlin*, 2 All E.R. at 301, 311 (plaintiff suffered severe shock, organic depression and a change of personality).

The Warsaw Convention is a mitigated system of air carrier liability whose purpose is to provide uniform rules concerning liability limitations and to provide a uniform remedy that does not burden the carrier more than the Convention's provisions allow. *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 59, 255 N.Y.S.2d 249, 252, 203 N.E.2d 640, 642 (1964). It has been noted that "[m]ental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may be unwilling to open the door to an even more dubious field." *Prosser and Keeton*, *supra* p. 5, at 361. When the shifting context of the claim for pure psychic injury is contrasted with the Warsaw Convention's overall principle of allowing only a regulated burden to be borne by the air carriers, it becomes clear that the drafters did not intend to impose liability for fright, shock or other mental disturbances which are purely subjective and not often marked by any definite physical symptoms capable of clear medical proof.

B. The Eleventh Circuit's Construction Of "Lesion Corporelle" Conflicts With The Intent Of The Drafters As Evidenced By The Subsequent Conduct Of The Contracting Parties

The subsequent conduct of the contracting parties conclusively confirms that the parties to the Convention have understood that, (1) "lésion corporelle" is a precondition to an air carrier's liability under Article 17 and that, (2) amendment of Article 17 is necessary before liability can be imposed for pure mental injury. Almost immediately following the Convention's entry into force, early aviation law experts called for amendment of the Convention because Article 17, as originally drafted, precluded recovery for pure mental injury. *See* discussion, *supra* p. 17. In September of 1951, a committee comprised of representatives of various signatory nations met in Madrid, Spain to consider revision of the Warsaw Convention.[17] At the urging of Mr. Garnault, the *French delegate*, the conferees in Madrid voted to amend the official French text of Article 17 by substituting the words "affection corporelle" for the phrase "lésion corporelle." *Madrid Minutes*, *supra* p. 17, at 270. *See also Excerpts From The Report Of United States Delegation To Eighth Session Of The Legal Committee Of ICAO, Held At Madrid, Spain, September 1951*, 19 J. Air L. & Com. 70, 79 (1952) (hereinafter *Excerpts*). The amendment was deemed necessary because "lésion corporelle" was considered too narrow a term to permit recovery for bodily injury not necessarily associated with "the rupture of bodily tissue." *Excerpts*, *supra*, at 79. "Affection cor-

[17] The work of revising the Convention was taken up by the Legal Committee of the International Civil Aviation Organization ("ICAO") after World War II. A.F. Lowenfeld & A.I. Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv. L. Rev. 497, 502 n.18 (1967). ICAO is an organization of governments established in 1947 to consider international civil aviation matters. *See* Convention on International Civil Aviation, done at Chicago, December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

porelle" would broaden the category of compensable injuries and make clear that such physical injury as lung congestion or muscular paralysis, resulting from the discharge of carbon dioxide into the cabin of the aircraft, would be covered by the revised Convention. *Id.* Although this amendment has not been incorporated into Article 17, the fact that such an amendment was considered is compelling evidence that the signatory nations have not understood the phrase "lésion corporelle" to permit recovery for pure emotional injuries.

Additionally, the parties to the Warsaw Convention intended "bodily injury" in Article 17 to exclude recovery for mental injury as they have, since the Convention's entry into force, considered and consistently rejected proposals to expand the categories of compensable injuries to include pure mental injury. At the same Madrid conference, the delegates discussed the categories of personal injuries which should be covered by the revised convention and specifically declined to amend the Convention to provide for pure mental injury "in the sense of emotional upset unassociated with bodily injury." *Madrid Minutes, supra* p. 17, at 270; *Excerpts, supra* p. 25, at 79.

The issue was again raised at the conference on international air law which took place at The Hague in September 1955 and which led to the adoption of The Hague Protocol.[18] The conferees doubted that the original Warsaw Convention permitted a passenger claim for the fright or shock which a passenger might suffer as a result of an accident in international air transportation. I *Conférence Internationale de Droit Privé Aérien*, Sept. 1955,

[18] The Hague Protocol amended the original Warsaw Convention to provide, *inter alia*, for an increased liability limit to 250,000 poincaré francs. *Shawcross and Beaumont, Air Law*, at ¶ VII (14) (4th ed. 1988) (hereinafter *Shawcross and Beaumont*). It did not amend Article 17. *See* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air signed at The Hague Sept. 28, 1955, 478 U.N.T.S. 371, *reprinted in* A.F. Lowenfeld, *Aviation Law Documents* (hereinafter The Hague Protocol).

La Haye, Doc. 7686-LC/140, p. 261 (ICAO). They nevertheless rejected an amendment, proposed by the Greek delegation, substituting the phrase "any other bodily injury" by the phrase "any other *mental* or bodily injury."

The subsequent conduct of the contracting parties, therefore, confirms that Article 17 of the Warsaw Convention does not permit recovery for pure mental injury.

1. *The Eleventh Circuit's Reliance Upon The Guatemala City Protocol And The Montreal Agreement To Ascertain The Intent Of The Treaty's Drafters Is Wholly Misplaced*

The Eleventh Circuit has justified its conclusion by doubting the accuracy of the American translation of "lésion corporelle" as "bodily injury." The court noted that the official English text of the Guatemala City Protocol substitutes the phrase "personal injury" in the official English version of Article 17 while keeping the phrase "lésion corporelle" in the official French version.[19] (Pet. App. A-21). Similarly, the Eleventh Circuit noted that the Montreal Agreement and the Civil Aeronautics Board Order approving the Agreement, use the terms "bodily injury" and "personal injury" interchangeably

[19] The Guatemala City Protocol amends the Warsaw Convention and is incorporated in Montreal Protocols 3 and 4. *Shawcross and Beaumont, supra* p. 26, at ¶ VII (36). The Guatemala City Protocol creates an unbreakable airline liability limit of $125,000 for personal injury or death and permits signatory nations to establish a supplemental compensation plan to pay claims in excess of that limit. Montreal Aviation Protocols Nos. 3 and 4, Ex. B, 95-1, 1989: Hearing on S. 533 before the Committee on Foreign Relations, 101st Congress, 1st Sess. 16 (Nov. 15, 1989) (statement of Eugene J. McAllister, Asst. Sec. for Economic and Business Affairs, Dept. of State); ICAO 1 and 2 *Minutes and Documents of the International Conference on Air Law Guatemala City*, ICAO Doc. 9040-LC/167-1, 2 (1972). The Montreal Protocols are presently before the Senate for consideration.

and that the notice given to passengers advising them of the Convention's limitations uses the phrase "personal injury" instead of Article 17's "bodily injury." (Pet. App. A-19-20).[20] According to the Eleventh Circuit, this unexplained switch to "personal injury," which occurred some forty years after the original treaty was drafted, clarified the intention of the original framers that Article 17 permits recovery for "any 'personal' injury, *i.e.*, any injury suffered by the plaintiff as a person." (Pet. App. A-14).

However, the Eleventh Circuit's reliance on the Guatemala City Protocol is misplaced. The record of the proceedings at Guatemala City is devoid of any evidence that the signatories intended to effect either a clarification of the modern French text of Article 17 or a clarification of the original treaty framers' intent. *Husserl v. Swiss Air Transport Co., Ltd.*, 388 F.Supp. 1238, 1249-50 (S.D. N.Y. 1975) (change in Article 17 language at Guatemala City was made for unstated reason).[21] Therefore, since it is impossible to conclude whether the delegates at Guatemala City thought they were making a substantive change to Article 17 or that they merely intended to clarify the treaty framers' language, the Guatemala City amendments are ultimately of little help in ascertaining the meaning of the *original* Convention. *Cf. Saks*, 470 U.S. at 403-04 (comments of Guatemala City Protocol's framers regarding the term "accident" clearly indicated reason for change).

Moreover, it is noteworthy that the United States Senate has not ratified the Guatemala City Protocol.

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[20] In addition to requiring air carriers to agree to raise their liability limits and waive their "due care" defense (see discussion *supra* pp. 3-4), the Montreal Agreement requires air carriers to supply their passengers with written notice of the Convention's liability limitations. (Pet. Reply at E-2-3).

[21] *See generally* ICAO, 1 *Minutes of the International Conference on Air Law Guatemala City*, ICAO Doc. 9040/167-1 (1972).

Shawcross and Beaumont, *supra* p. 26, at ¶ VII (21). In fact, the Protocol has not been ratified by any nation. *Id.* Therefore, it is the terms of the Warsaw Convention, as originally drafted, which control Eastern's liability in the instant case. *Chan*, 109 S. Ct. at 1683. Paradoxically, while ostensibly recognizing that the Guatemala City Protocol does not apply to this case, the Eleventh Circuit has effectively construed these amendments so as to give them the same force and effect accorded treaties ratified by the Senate.[22]

Similiarly erroneous is the Eleventh Circuit's conclusion that the use of the phrase "personal injury" interchangeably with "bodily injury" in the Montreal Agreement signifies a clarification of Article 17's language. Andreas F. Lowenfeld was Chairman of the United States delegation at Montreal and was pointedly asked whether the use of "personal injury" was intended to clarify the intent of the Convention's framers that Article 17 permits claims for pure mental injury. *Lowenfeld*, *supra* p. 23, at 347-48. He responded *unequivocally* that the drafters of the Agreement did *not* discuss the issue and that the "assumption [at Montreal] was that the meaning of [Article 17] goes back to what was intended in

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[22] Moreover, the Eleventh Circuit's narrow observation that Article 3(1)(c) of the Convention (as amended by The Hague Protocol) uses "personal injury" while retaining "lésion corporelle" in the French does not aid in the proper interpretation of Article 17. Article 17 itself was *not* amended at The Hague. *See generally* ICAO, 1 *Minutes of the International Conference on Private Air Law at The Hague* (1955). That Article, therefore, did not appear in the trilingual (English/French/Spanish) text of The Hague Protocol. *See* The Hague Protocol, *supra* p. 26, Supp. at 956, *et seq.* Therefore, there exists only an authentic French text of Article 17.

Additionally, contrary to the Eleventh Circuit's conclusion, the record of the proceedings at The Hague establishes the understanding of the contracting parties that an amendment of "lésion corporelle" is needed before liability can be imposed for pure mental injury. *See discussion*, *supra* pp. 26-27.

the Warsaw Convention itself." *Id.* at 347. As to the Montreal Notice, he explained that "no legal significance should be attached to this change in wording [to personal injury] which was occasioned solely by the need to draft an intelligible notice in readable type in the space provided by the ticket booklet." *Id.* at 347 n.7. This Court has held that the Montreal Agreement did not waive any of the provisions of Article 17 which operate to qualify an air carrier's liability. *Saks*, 470 U.S. at 406-07. Despite this, the decision below has impermissibly construed the Montreal Agreement in such a way as to effectively circumvent a treaty provision. *Id.* Moreover, although the parties to the Montreal Agreement did not intend to expand their liability under Article 17, the decision below has construed the Agreement as if the parties had agreed to broaden their liability.

Finally, it has been noted that the translation of "lésion corporelle" as "bodily injury" "is as good as any translation can be." *Lowenfeld*, *supra* p. 23, at 348. As discussed above, the phrase "lésion corporelle" does *not* translate into "personal injury" in any literal or legalistic sense. Moreover, other English-speaking contracting nations to the Convention have uniformly translated "lésion corporelle" as "bodily injury" in schedules attached to legislation implementing the Warsaw Convention. Carriage by Air Act of 1961, 9 & 10 Eliz. 2, ch. 27 (Great Britain), *reprinted in Shawcross and Beaumont*, *supra* p. 26, at app. B60; Civil Aviation (Carriers' Liability) Act of 1959, sched. 2 (Australia); Carriage By Air Act of 1939, 3 Geo. VI, ch. 12 (Canada). The American translation of the treaty was before the Senate when it ratified the Convention in 1934. *Saks*, 470 U.S. at 397. Moreover, as the official State Department translation of the Warsaw Convention, it provides compelling evidence of its proper interpretation. The meaning attributed to treaty provisions by government agencies charged with their negotiation and enforcement is entitled to great weight. *United States v. Stuart*, 489 U.S.

353, ——, 109 S. Ct. 1183, 1193 (1989). Therefore, "lésion corporelle" means and has been correctly translated into "bodily injury."

Nor would a translation of "lésion corporelle" into "personal injury" be determinative of the notice issue alluded to in the decision below. (Pet. App. A-20). The phrase "personal injury" does not automatically effect notice that recovery for pure mental anguish is permitted. In the United States, courts have been reluctant to permit recovery for mere mental distress and generally require a showing of some accompanying bodily injury or intentional misconduct on the part of the tortfeasor. *See e.g.*, *Langeland v. Farmers State Bank of Trimont*, 319 N.W. 2d 26, 31 (Minn. 1982) (no recovery for negligent infliction of emotional distress absent physical injury); *see Prosser and Keeton*, *supra* p. 5, at 361. In England, courts do not allow claims for mere mental anguish or distress. *McLoughlin*, 2 All E.R. at 301, 311. The contention that the Warsaw Convention permits recovery for pure mental injury if "lésion corporelle" can be translated into "personal injury" is meaningful only to commentators who find that the device facilitates their expansive construction of Article 17. *See e.g.*, *Mankiewicz*, *supra* p. 20, at 141, 146; *Palagonia*, 110 Misc. 2d at 487, 442 N.Y.S.2d at 675. The translation of "lésion corporelle" as "personal injury" is the invention of modern commentators and not a translation which is compelled by the intent of the treaty's drafters.

C. The Decision Below Expands An Air Carrier's Liability In A United States Court Beyond That Of Its Liability In The Courts Of Other Signatories To The Warsaw Convention

In determining the proper interpretation of a treaty's terms, the opinions of other signatories are entitled to considerable weight. *Saks*, 470 U.S. at 404. Although there is not much directly on point, leading scholars in both

England and France have concluded that the application of Article 17's express terms by English and French courts would preclude claims for mere mental anguish and anxiety unaccompanied by bodily injury. A leading English aviation law expert has stated:

> If [Article 17] is interpreted literally, in accordance with the usage of the relevant words in other English law contexts, a fairly restricted meaning will be discovered. 'Wounding' has been interpreted for the purposes of §§ 18 and 20 of the Offences against the Person Act 1861 as involving a breach in the continuity of the whole skin. A fractured bone has been held not to constitute a wound when the skin remained unbroken. Such fractures, together with torn ligaments, sprained or strained muscles, and perhaps bruises, would be 'bodily injuries.' The presence of the adjective 'bodily' might well persuade an English court that 'any bodily injury' in art. 17 should be interpreted to cover this latter class of injury and should not be extended to mere mental anguish or anxiety unaccompanied by such injury.

Shawcross and Beaumont, *supra* p. 26, at ¶ VII (154). *See also Miller*, *supra* pp. 18-19, at 128-29 (literal interpretation of Article 17's terms precludes recovery for pure mental injury). The Republic of France in *Saks*, argued in this Court that a *literal* reading of Article 17's terms is the *correct* interpretation. Brief of Amicus Curiae, for The Republic of France at 9, *Air France v. Saks*, 470 U.S. 392 (1985) (No. 83-1785) (November 15, 1984). *But see Dadon v. Air France* [1984] 38 (3) P.D. 785, *rept. sub. nom. Cie Air France v. Teichner* [1985] 39 RFDA 232 [1988] 23 Eur TrL 87 (Israeli courts permit recovery).

Even if the courts of the other signatory nations could be persuaded to broadly construe Article 17, extending the reach of that Article to permit recovery for mere "fright" or "mental anguish" would still expand an air carrier's liability in United States courts beyond that of other signatory nations. In France, it has been noted that the requirement of "lésion corporelle" does not permit recovery under Article 17 for intense fright or shock. J. Tosi, *Responsabilité Aérienne* 44 (1978). Moreover, English law does not recognize a cause of action for mere mental anguish or distress. *McLoughlin*, 2 All E.R. at 301, 311; *Shawcross and Beaumont*, *supra* p. 26, at ¶ I (112) (plaintiff must establish "nervous shock," i.e., positive psychiatric illness).

The decision below defeats the Convention's purpose of uniformity by creating a cause of action for mere "mental pain and anguish," "fright," and "distress," under Article 17 which would not be recognized by courts of other signatory nations. It guarantees that United States courts will become attractive to plaintiffs seeking a more generous recovery than that which they would realize in the courts of these other nations.

III. THE DECISION BELOW UNDERMINES THE CONVENTION'S PURPOSES OF UNIFORMITY AND PREDICTABILITY BY IMPOSING STRICT LIABILITY ON CARRIERS FOR A PURELY SUBJECTIVE AND UNDEMONSTRABLE INJURY

If allowed to stand, the decision below will have a substantial impact on all international aviation. Because under the Warsaw Convention and the Montreal Agreement an air carrier is presumptively and strictly liable for its passengers' accidental in-flight injuries, the decision below imposes upon international air carriers strict liability for its passengers' subjective and undemonstrable injuries. Historically, the law has been reluctant to redress fright or shock:

> The temporary emotion of fright, so far from serious that is does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the

elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort context are lacking.

Prosser and Keeton, supra p. 5, at 361.

Therefore, recovery for pure mental distress generally requires a showing of physical injury, physical manifestation of psychic injury or extreme or outrageous misconduct by the tortfeasor. *Prosser and Keeton, supra* p. 5, at 60-65, 359-61. Courts which have analyzed the issue in this case in the context of the strict liability regime imposed upon air carriers under the Warsaw Convention and the Montreal Agreement, have properly declined to create a cause of action divorced from the traditional limitations attendant to the recovery for pure mental distress. *See e.g., Rosman*, 34 N.Y.2d at 396, 358 N.Y.S.2d at 106, 314 N.E.2d at 854; *Burnett*, 368 F.Supp. at 1157. *But see Palagonia*, 110 Misc.2d at 479, 442 N.Y.S.2d at 671. The decisions holding that the Warsaw Convention does not bar recovery for emotional injury *if state law* permits recovery, have usually decided the issue in the context of state law remedies which impose safeguards that separate the spurious from the meritorious claims. *Husserl*, 388 F.Supp. at 1247.

The purpose of the Warsaw Convention was to establish stable, predictable, and internationally uniform liability rules and limits. *Franklin Mint*, 466 U.S. at 256-57. The decision below undermines the Convention's purposes by exposing air carriers to a potentially unlimited number of frivolous and unverifiable claims. Conceivably, every hypersensitive individual with a fear of flying could require an airline to pay on a claim for the discomfort experienced on a flight beset by unavoidable turbulence.

The Eleventh Circuit has created an anomalous cause of action which opens wide the door to a flood of fictitious or frivolous litigation.

IV. THE WARSAW CONVENTION IS THE UNIVERSAL SOURCE OF AIR CARRIER LIABILITY FOR PASSENGER DEATH OR INJURY RESULTING FROM AN ACCIDENT IN INTERNATIONAL AIR TRANSPORTATION

As discussed above, the terms of the Warsaw Convention do not allow recovery for pure emotional injury unaccompanied by physical manifestations. In order that the uniformity intended by the drafters of the Convention be followed, it is imperative that the treaty be deemed the exclusive source of air carrier liability, thereby precluding recourse to national or local law.

The question of the Warsaw Convention's exclusivity is intertwined with the question of whether Article 17 comprehends recovery for pure mental or emotional injury. Courts which have read Article 17 broadly have often done so out of a concern that damages not comprehended by the Convention may give rise to state created causes of action not subject to any of the Convention's conditions or limits. *See Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D. N.Y. 1977); *Husserl*, 388 F.Supp. at 1246. An expansive reading of the types of injury comprehended by Article 17 has been deemed to advance the Convention's purpose of limiting air carrier liability. *Husserl*, 388 F.Supp. at 1246-47. Thus, the courts have been forced into the broad interpretation of Article 17 out of a persistent concern that the Warsaw Convention would be circumvented and un-

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[23] The Court previously declined to address the exclusive nature of the Warsaw Convention in *Saks* because it was unclear whether the issue was raised in the court of appeals. 470 U.S. at 408. Here, in contrast, the issue was preserved by Eastern during both the trial and appellate proceedings. Indeed, although the Eleventh Circuit chose not to determine whether the Convention "provides the exclusive grounds for relief for an airline passenger involved in an accident" because this Court has not definitively spoken on the issue, it did decide that the Convention "preempts those aspects of plaintiffs' state law claims which are inconsistent with the Convention." *Floyd*, 872 F.2d at 1482 and n. 33.

dermined by resort to state law causes of actions. This Court can resolve this dilemma by holding that the Warsaw Convention constitutes the exclusive source of air carrier liability for loss or injury suffered in international air transportation.

Prior to *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), the general rule was that the Warsaw Convention did not create a cause of action but merely imposed limits on state law causes of action. In *Benjamins*, the Second Circuit reversed its prior rulings and held that the Warsaw Convention did create a cause of action which serves as the universal source of air carrier liability. 572 F.2d at 919.

The conclusion that the treaty creates the universal source of recovery is supported by the history of the Convention and the language and intent of the drafters. The text of the Convention declares the signatories' intent as "regulating in a *uniform* manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." Warsaw Convention, Preamble (emphasis added). *See also Franklin Mint*, 466 U.S. at 256.

The drafters of the Warsaw Convention feared a destruction of the intended uniformity if each nation applied its own law. Throughout the *Minutes*, there are numerous statements by the drafters urging that recourse to national law be restricted. For example, Mr. Ripert, a member of the French delegation stated:

> [W]e are absolutely opposed to a formula that would lead to the application of national law . . . . From our point of view, one would thus arrive [sic] in destroying the Convention, if one establishes recourse to national law upon each article . . . . I beg the delegates not to enter upon this dangerous course which would consist in reserving the result of the litigation to national law.

Minutes, supra p. 15, at 66. *See also Id.* at 65("We wish that the Convention be applied in all cases. . . . In any case, *recourse to national law must be ruled out.*") (Mr. Ambrosini, Italy) (emphasis added); *Id.* at 213 (the stipulation that liability actions under Article 24 can only be brought under the terms and limits of the Convention "touches the very substance of the Convention, because this excludes recourse to common law") (Sir Alfred Dennis, Great Britain).

The Convention, therefore, was carefully formulated to eliminate recourse to national or local law, except in expressly specified instances. Where the Convention does make reference to "local" law, such as Article 21 (contributory negligence) Article 24(2) (standing of and allocation among survivors) Article 25 (fault equivalent to willful misconduct) Article 28 (procedure) and Article 29 (running of the statute of limitations), the interpretation of the term "local" refers to the law of the nation. Where local law is not referenced and the Convention does not specify relief, the treaty precludes all other remedies. *See In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F.Supp. 833, 845 (E.D. N.Y. 1982) *aff'd*, 705 F.2d 85 (2d Cir. 1983) ("the language of Article 24 was included specifically for the purpose of preventing the institution of independent claims outside the sphere of the Convention . . . [and] . . . would have no meaning if this exclusivity argument were rejected and plaintiffs were permitted to assert independent causes of action under [local] law").

Several appellate courts have held that the Warsaw Convention is the exclusive source of air carrier liability where it applies. *See Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 458 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985). *See also In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *Benjamins*, 572 F.2d at 919. Because the issue is squarely before this Court, and

because the Second, Fifth, and Ninth Circuits' reasoning is more consistent with the treaty language and the intent of the drafters, the Court should pronounce that the Warsaw Convention provides the exclusive remedy for passenger death or injury sustained in the event of an accident in international air travel.

It is well established that federal law will impliedly preempt the application of state law where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Sav. and Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Floyd*, 872 F.2d at 1482 n.33. In *Boehringer-Mannheim*, the First Circuit noted that all state law causes of action would necessarily conflict with the Convention due to the interests of national and international uniformity and must therefore be preempted. 737 F.2d at 459. Similarly, in *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977), the Second Circuit stated:

> [A] fundamental purpose of the signatories to the Warsaw Convention . . . was their desire to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws. . . . Confronted with the prospect of a jungle-like chaos unless a uniform system of liability rules governing fundamental aspects of international air disaster litigation was devised, the framers of the Convention proceeded to draft a treaty which laid down uniform rules . . . .

Reed, 555 F.2d at 1090, 1092 (citations omitted).

Without this Court's determination that the Warsaw Convention is a passenger's exclusive remedy, the drafters' intent to "reduce, not to increase, the economic uncertainties of air transportation" will be thwarted. *Franklin Mint*, 466 U.S. at 260.[24] A definitive determination that the Warsaw Convention is both exclusive and preclusive will not only serve to guide the airline industry and the traveling public, but will also foster the intent of the drafters to uniformly regulate an air carrier's liability for injuries caused by an accident in international air transportation.

CONCLUSION

For the foregoing reasons, Eastern respectfully urges this Court to reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[24] Although the Supreme Court of Florida has determined that recovery for pure emotional injury in this case is not compensable under state remedies, the court did not bar all claims for pure emotional injury under state law, only the claim under the facts of this particular case. *King*, 557 So.2d at 576. Therefore, passenger claims for emotional injury can still arise in other Florida cases, unless this Court determines that the Warsaw Convention establishes the only available remedy for injuries arising from accidents occurring in international air transportation.